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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-886

RICE GROWERS' ASSOCIATION OF CALIFORNIA,
a corporation, *Petitioner,*

vs.

COUNTY OF YOLO, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California, First Appellate District, Division Two

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Petitioner Rice Growers' Association of California prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District, entered in the above-entitled case (1 Civil No. 27,321), on April 28, 1971. A hearing was denied by the Supreme Court of California on June 23, 1971.

OPINIONS OF THE COURTS BELOW

The decision and judgment of the Superior Court of the State of California, for the City and County of San Francisco awarded petitioner a tax refund in the amount of $89,993.96. That decision is not reported, but the Court's "Findings of Fact and Conclusions of Law," as well as its judgment appear at pages 28-42 of the Clerk's Transcript (hereinafter "C.T.").

The decision and opinion of the Court of Appeal of the State of California, First Appellate District (Division Two) reversing the judgment in favor of petitioner is reported as follows: *Rice Growers' Association of California v. County of Yolo,* 17 Cal.3d 227, 94 Cal.Rptr. 847 (April 28, 1971). A copy of that opinion is set forth as Appendix "A" hereto.

On June 23, 1971 the Supreme Court of California summarily denied petitioner's request for a hearing. The action of the Court is not reported, but a copy of the order is set forth as Appendix "B" hereto.

JURISDICTION

The judgment of the Court of Appeal of the State of California, First Appellate District, Division Two, was rendered on April 28, 1971, and became final on May 28, 1971, reversing a decision in favor of plaintiff-petitioner herein by the Superior Court of California for the City and County of San Francisco (No. 574862 April 16, 1969). Thereafter on June 23, 1971, the Supreme Court of the State of California denied a petition for hearing.

(See Appendix "B".) The jurisdiction of this Court is involved under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

Important questions concerning exports and their federal constitutional immunity from state taxation are presented in this case:

1. The primary issue for this Court is whether the goods here involved—six (6) separate categories and quantities of rice, or any one thereof—had achieved the status of "export" at or prior to the time it was subjected to a tax assessment by respondent County of Yolo. If so, such rice is immune from all state and local taxation pursuant to Article I, Section 10 of the Constitution of the United States.

2. A subsidiary issue is whether goods sold to purchasers in Puerto Rico, the destination of the rice in category 1 herein, is considered an export for purposes of the constitutional immunity established by Article I, Section 10 of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, Clause 2 of the Constitution of the United States provides in pertinent part:

> "No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, * * *"

STATEMENT OF THE CASE

This is a suit filed by petitioner Rice Growers' Association of California (hereinafter "RGA") against the respondent County of Yolo, for the recovery of $89,993.96. (C.T. 7.) That amount was paid by RGA to said County, as payment of taxes under protest, pursuant to the County's assessment on property allegedly belonging to RGA. (C.T. 16, 17.) All the property involved consists of rice which RGA alleges had assumed the status of an "export" at the time of respondent's assessment and, as such, was immune from local taxation by virtue of Article I, Section 10 of the Constitution of the United States. (C.T. 6, 7.)

This case was tried in the Superior Court of the State of California, for the City and County of San Francisco upon a joint and agreed stipulation of facts (C.T. 15-17); the agreed facts are fully set forth in the "Clerk's Transcript" and hence need not be here stated in great detail. The primary issue before the Superior Court was whether the rice, which was the subject matter of the contested assessments against RGA, or any category thereof, had assumed the status of "export". If so, as petitioner contends, then the taxation by the respondent County of Yolo was constitutionaly impermissible under Article I, Section 10, and RGA is entitled to a refund of the $89,993.96 in taxes which has already been paid under protest to the County.

The rice involved was the subject of six (6) different assessments. Thus, for the convenience of the Courts below, the total rice here involved was separated into six (6) categories so as to indicate the description, location,

weight and amount of tax levied and paid as to each individual assessment as follows (C.T. 18, 31):

Assessment No.	Description and Location Name of Ship	No. of Pounds	Tax Levied and Paid
1. 2596	Pearl Milled Rice in bins at the Port of Sacramento (Rice Queen)	9,054,020	$15,618.15
2. 5911	Calrose Milled Rice in bins at the Port of Sacramento (Polk)	405,325	699.48
3. 5915	Calrose Brown Rice in bins at the Port of Sacramento (Belnor)	13,876,400	20,944.95
4. 5914	Calrose Brown Rice in separate bins at Plaintiff's West Sacramento Warehouse (Belnor)	2,499,300	3,934.41
5. 5913	Pearl Brown Rice in separate bins at Plaintiff's West Sacramento Warehouse (Hope Peake/Avenir)	2,137,100	3,364.13
6. 5912	Pearl Paddy Rice unmilled located at Plaintiff's West Sacramento mill (Hope Peake/Avenir)	42,090,700	45,432.84
			$89,993.96

Although at the time of the assessment, all of the rice was physically located in California, there are other factors which make it clear that all categories of rice were irrevocably committed to exportation. The rice in each category, above, was, at the time of the assessment, the subject of a binding contract with an order from a foreign purchaser. (C.T. 18-19.) Moreover, the rice in

categories 1 through 5 was milled in a specific manner for the foreign purchasers; no domestic market existed for rice milled in that way. (C.T. 19-24.)

It is also important to note that, where possible, the rice had been delivered by RGA to the Port of Sacramento for shipment prior to the time of the assessment. The rice in category 1 had been transported to the port and stored in bins belonging to the Port Authority prior to the tax lien date. (C.T. 19-20.) The rice was there awaiting ocean transportation in a vessel to be designated by the foreign purchaser at the time of the assessment. (C.T. 20.) This rice was in fact exported to Puerto Rico on or about March 30, 1966. (C.T. 20.)

Likewise, the rice in categories 2 and 3 had been milled, processed and transported to bins owned by the Port of Sacramento to await ocean shipment prior to the date upon which the County assessed its tax thereon. (C.T. 20-21.) All of the rice in category 2 was transported to Okinawa on or about March 20, 1966. (C.T. 21.) All of the rice in category 3 was transported to Japan on March 31, 1966. (C.T. 22.)

The rice in categories 4 and 5 was also specially milled and processed for the Japanese market prior to the tax assessment. Such rice was also to be stored in bins at the port awaiting ocean transportation; however, *due to a lack of space at the port,* the rice in categories 4 and 5 was transported to RGA's West Sacramento warehouse which is located approximately one mile from the port. At the time of the assessment, all of said rice had been separated into special bins to await a vessel to be designated by the foreign purchaser. (C.T. 22-23.) This rice was in fact

loaded aboard Japan bound vessels on March 31 (Category 4 rice) and April 9 and May 5, 1966 (Category 5 rice). (C.T. 22-24.)

The rice in category 3 filled a sale by RGA pursuant to the sales order confirmed in February, 1966, by the Japanese Rice Importers Association. This rice was Pearl Paddy rice with a content known by RGA to be capable when milled of fulfilling the requirements and specifications of the purchaser. The rice was, at the time of the assessment, segregated and it occupied an entire storage warehouse at RGA's West Sacramento mill. Subsequent to the lien date all of said rice was milled in accordance with the purchaser's specifications and was exported to Japan aboard the M.V. Hope Peake and M.V. Avenir. (C.T. 24.)

The rice in category 6 was necessary in order for RGA to meet its contractual obligations under the agreement with the Japanese Importers Association. If this particular rice was not used, RGA would not have enough of its own rice on hand to meet its contract obligations.

All of the rice here involved was milled by RGA to fill specific orders with the various foreign purchasers pursuant to binding contracts which were consummated prior to the tax assessment. (C.T. 26.) RGA had, prior to the assessment declared to the United States government that the rice in categories 2, 3, 4, 5 and 6 would be exported to Okinawa and Japan. Pursuant to RGA's agreement with the government, it received a subsidy of $1.22 for each one hundred pounds of rice exported. However, if RGA had defaulted by failing to so export such rice, it would not have received a subsidy, and, in addition, would

have been required to pay a penalty to the government of $1.50 for each one hundred pounds of rice not exported. The price RGA sold said category 2 rice was approximately $8.10 for each one hundred pounds. The price RGA sold the category 3, 4, 5 and 6 rice was $6.20 for each one hundred pounds. (C.T. 27.)

Pursuant to the stipulated facts and the written and oral arguments presented, the Superior Court, on April 16, 1969, ruled that (C.T. 40):

> "1. The rice in categories 1, 2, 3, 4, 5 and 6 were exports within the meaning of Article 1, Section 10 of the Constitution of the United States and hence immune from the property tax assessed and collected from Plaintiff by the Defendant.
>
> 2. The Plaintiff is, therefore, entitled to a refund as to such taxes paid to Defendant in the amount of $89,993.96 plus interest (at 5% from August 19, 1966) and costs."

The California Court of Appeal reversed this judgment on April 28, 1971; that decision and opinion is set forth as Appendix "A", *infra.* The clear effect of that ruling is to deny the constitutional tax immunity to all items for export unless and until such have been moved out of the country. Repeatedly, the Court of Appeal stated that movement—*or the commitment thereto*—are necessary to a finding that the goods have attained the status of "exports". (See opinion, Appendix "A", pp. vi-viii.) In defining the nature of the "commitment" required, the Court ultimately quoted (out of context) the words of Mr. Justice Douglas that to import or to export are ". . . acts which begin and end at water's edge." (Opinion, Appendix, p. xix.)

Thus, despite the apparent recognition by the Court of Appeal that goods become exports for purposes of the federal constitutional immunity when they have been committed to exportation (or movement), the necessary effect of the ruling is to regard *actual* movement out of the country as the prerequisite for the application of the immunity.

As will be demonstrated in the Argument, below, the rice here involved had been irrevocably committed to movement abroad prior to the tax lien date. Yet, the Court below ignored the certainty of the commitment of the rice.

To add further confusion to its opinion, the Court below approvingly cited the numerous rulings of this Court as well as the Supreme Court of the State of California, which establish that goods may attain the status of exports and hence be immune from local taxation, prior to the date the goods are shipped abroad. For example, the Court quoted the following language from *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69, 82 (1946):

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved . . . ."

The Court below then focused on eleven separate considerations which evidence certainty of export (Opinion, Appendix, pp. xiii-xvi), nearly all of which apply to the rice here in question. The Court brushed all of these away

holding that no one of these elements can establish the export status of the goods. The Court then went on to say that the mere intention to export the goods does not establish their immunity. (Opinion, Appendix, p. xviii.)

The Court thus misconstrued and mis-characterized our present case. It is clear, and petitioner RGA recognizes that the mere intention to export certain items is not sufficient to raise the federal constitutional immunity. Nor does RGA contend that any one of the eleven elements enumerated by the Court below, of itself, would raise the immunity.

However, when—as in our case—nearly all of the relevant criteria for determining export status are simultaneously present, and when the rice in five of the six categories here involved is physically transported to the Port (or as near thereto as is possible) to await loading onto a ship to be designated by the foreign purchaser, then petitioner contends, the immunity is constitutionally required.

The Court of Appeal below, however, ignored the certainty of export in the present case and the commitment of the rice to movement abroad. The Court, also all but ignored the important policy which underlies the immunization of exports from local taxation. Instead, the Court concerned itself with the ". . . present parlous condition of state and local finances . . . ." (Opinion, Appendix, p. vi.) Thus, the ruling below, in the name of financial benefit for local government, waters down the constitutional requirement of the immunity for exports from local taxation. In so ruling the Court ignored the special exemption from all taxation—state and federal—accorded

to exports. (Compare Article I, Section 9.) This immunity clearly evidences a federal constitutional commitment encouraging free and open exportation, and its concomitant establishment of a more favorable international balance of payments and trade posture.

All of this was ignored by the California Court of Appeal in its rush to unjustifiably restrict the federal constitutional immunity in favor of enhancing the local property tax base.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE DETERMINATION OF THE EXPORT STATUS OF PROPERTY FOR PURPOSES OF IMMUNITY FROM LOCAL TAXATION UNDER ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES.

Throughout its opinion, the Court below ignores the important federal interest in promoting commercial exportation and international trade, an interest which has recently become even more significant in the light of current economic problems and the necessity of the United States to maintain a more favorable international balance of payments and trade posture. Instead of considering this national policy which encourages exportation (U.S. Const. Art. I, §§ 9, 10), the Court below was decisively influenced by what it referred to as the ". . . parlous condition of state and local finances . . ." (App. "A", p. vi.) Petitioner submits that the eagerness of the respondent County of Yolo to collect taxes cannot be made the basis for impeding the paramount federal interest in promoting commercial exportation by the granting of tax immunity.

A. For Purposes of Property Taxes, Goods Become Exports, and Hence Immune from State Taxation, When They are Irrevocably Committed to the Process of Exportation; Actual Removal or Movement Outside the Country is Not Necessary.

Throughout its opinion, the Court of Appeal below articulates the rigid and extremely unreasonable position that goods sold to foreign purchasers may not be characterized as "exports" until they are actually moved or transported out of the United States. Such an argument is untenable upon a review of the law governing tax immunity of goods for export.

Article I, Section 10 of the United States Constitution provides: "No State shall, without the consent of Congress lay any Imposts or Duties on Imports or Exports." Neither the literal terms of the constitutional prohibition nor the modern cases interpreting it require that goods involved be transported out of the country as a condition precedent to the application of immunity. Indeed, this Court has recognized that the purposes and policies underlying the Constitutional Import-Export immunity could be completely frustrated by the application of a mechanical approach (as adopted by the Court below) which would determine the import-export status of goods solely on the basis of whether transportation has started or ended. *Brown v. Maryland,* 12 Wheat 419 (1827).

Brown concerned the immunity of imports. The Court there recognized that imported items could still retain their immunity after being delivered into this country. In later decisions such as *Hooven & Allison Co. v. Evatt,* 324 U.S. 652 (1945) and *Youngstown Sheet and Tube Co. v. Bowers,* 358 U.S. 534 (1959), the Court reaffirmed this rule as to imports. The mere fact that the import was,

at the time of the assessment, located in the taxing state would not defeat the federal constitutional immunity from state tax unless the taxpayer was using the property or otherwise treating it as it would a domestic item. 324 U.S. at p. 657. This also explains the rulings in two California cases, *Virtue Bros. v. Los Angeles,* 239 C.A.2d 220 (1966) and *American Smelting and Refining Co. v. Contra Costa,* 271 C.A.2d 437 (1969) upon which respondent heavily relied below.

In *Hooven,* imported property retained its constitutional immunity as an import, even though the property was in the warehouse of the taxpayer located in the taxing state. 324 U.S. at p. 679. In *Youngstown,* imported property in the taxpayer's warehouse was held not immune because it had been "committed" to the taxpayer's use in the local state and had thereby lost its characteristics as an import.

When these "import" cases are applied to our "export" situation, it becomes obvious that respondent's reliance on the mechanical factor of the presence of the rice in California is erroneous. For these cases clearly demonstrate that, under Article I, Section 10, property may be immune from state taxation even though it is situated within the taxing state at the time of the assessment. These cases also recognize that the taxpayer's relationship to the goods on assessment day is more important in determining the applicability of the constitutional immunity than the mere physical location of the assessed property, 324 U.S. at p. 658.

The Court of Appeal's rigid adherence to the necessity of movement out of the country as the sole factor govern-

ing the status of exportation also erroneously ignores the recent federal and California "export" cases to the contrary. *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946); *Von Hamm-Young v. San Francisco,* 29 C.2d 798 (1947); *Montrose Chemical Corp. v. Los Angeles,* 243 C.A.2d 300 (1966).

These cases emphasize the abandonment of the inflexible requirement of foreign transportation as the sole determinant for immunity. Instead they establish a far more reasonable standard: whether, considering all relevant factors, there is certainty that the goods are presently for exportation. *Richfield Oil Corp. v. State Board of Equalization, supra.*

In its opinion below (App. "A", p. ix), the Court of Appeal cites the language of the *Richfield* case, which states that ". . . certainty that the goods are headed to sea . . ." is the test for the immunity; and, further, that certainty may exist even though ". . . no common carrier is involved . . . ." (329 U.S. at p. 82.)

The Court then goes on to apply the ruling in *Empresa Siderurgica v. Merced,* 337 U.S. 154 (1949) but—again—in a way which ignores some of the operative language of that case. In *Empresa, Richfield* and all of this Court's controlling decisions on the issue of export immunity, the operative and governing language is essentially the same: domestic items become exports and are immune from local taxation when they are "committed" to exportation or movement abroad. See also the rulings of the Supreme Court of California in *Von Hamm-Young v. San Francisco, supra* (29 C.2d at p. 807); and *Gough Industries v. State Board of Equalization, supra* (51 C.2d at p. 749.)

Even the cases cited below by respondent County of Yolo, support the view that the internal movement of goods (as occurred with nearly all the categories of rice in our case) marks the beginning of the exportation process. See *Hugo Neu Corp. v. Los Angeles,* 241 C.A.2d 703, 50 Cal.Rptr. 916 (1966); *Hugo Neu Corp. v. Los Angeles,* 7 Cal. 3rd 21, 25 (1970).

The Court of Appeal below, however, agreed with the respondent's argument that this more reasonable and flexible test for the immunity would cause ambiguity and uncertainty and that it tends toward shrinkage of the local tax base. However, in meeting the requirements established by the United States Constitution, certainty and predictability must often be sacrificed for the achievement of the superior federal objective—here, immunity for *all exports,* not merely for those exports already transported. And of course, the clear policy of Article I, Section 10 is to restrict local taxing authority which conflicts with that articulated federal interest.

In fact, the standard adopted below would cause great havoc and inconvenience to all exporters of goods. If the sole standard for tax immunity was transportation, all exporters would have to be certain to ship their goods prior to the tax lien date. Those fortunate enough to arrange the transportation one day prior to the lien date would have their immunity. Other exporters, similarly situated with identical goods, who could not arrange for transportation until one day after lien date would receive no immunity. Such a mechanical rule would clearly run counter to the federal policy of protecting *all* exporters—not only those who are fortunate enough to arrange opportune transportation.

A good illustration of the injustice of the position adopted by the Court below can be seen in the present case. Here, much of the rice (categories 1 through 5) which RGA was exporting was ready for foreign shipment prior to the tax lien date. Unfortunately, RGA was compelled to postpone complete transportation until vessels could be arranged by the buyers. RGA had transported as much of the rice as possible to the port, where it was stored in bins awaiting ocean transportation. When there was no more available space at the port, RGA transported and stored more of the rice at its warehouse near the port where the rice was placed in separate bins. As of tax lien date, all of this rice (categories 1 through 5) had been specially milled for exportation under binding contracts with foreign purchasers. It would be clearly unjust and unconstitutional to deny tax immunity merely because transportation was not arranged until shortly after the tax lien date.

It must be recognized that the federal constitutional provision represents a national policy encouraging exportation of local goods by restricting the power of local governmental units to impose tax burdens on such items. In this respect, exports and imports must be distinguished. Article I, Section 9 of the United States Constitution forbids the federal government from laying a tax or duty ". . . on articles exported from any State." Thus, while Congress or any state (with the consent of Congress) may tax imports—exports are immune from state *and federal* taxation.

This situation seems to evidence a clear constitutional commitment in favor of free exportation. Such an inter-

pretation is most consistent with current economic exigencies: more extensive exportation would assist this nation in maintaining a favorable international balance of payments and trade posture. Perhaps it is this realistic economic policy which has stimulated the courts to grant greater tax immunity to exporters. *Richfield Oil Corp. v. State Board of Equalization, supra.*

In *Richfield,* the Supreme Court considered Article I, Section 10 in connection with Article I, Section 9 and observed that the immunity of exports is to be broadly construed. 329 U.S. at 76-77. The Court, below, failed to recognize this important national policy.

The Supreme Court, in *Richfield,* eschewed any narrow or limited application of the export immunity by observing that its

> ". . . purpose was to withhold from Congress the power to tax exports, and to deprive any State of the power except with the consent of Congress and even then, it seems, to require the net proceeds to be paid into the federal treasury. A proposal was made to prohibit the States 'from taxing the produce of other States exported from their harbours.' But that suggestion was not followed. The language adopted was supported by Madison 'as preventing all State imposts'. The qualified interpretation urged upon us has therefore no substantial support in the history of the Import-Export Clause. Moreover, to infer qualifications does not comport with the standards for expounding the Constitution." 329 at 77.

Thus, in our case, the Court must concern itself with the question of whether the rice here involved was committed to the exportation process at the time it was as-

sessed regardless of the fact that the rise had not yet been actually transferred to the foreign purchaser.

B. There Was "Certainty of Export" as to the Rice Involved in the Present Case in that RGA had "Irrevocably Committed" Such Rice to the Process of Exportation and Movement Abroad.

The Court below erroneously characterized petitioner's contention in the present case. It incorrectly assumed that RGA is demanding tax immunity for the rice here involved merely because it ultimately *intended* to export such rice. However, RGA recognizes that a mere intent to sell goods to a foreign purchaser is not sufficient to raise the exportation immunity. But in our case, there existed far more than RGA's intent to sell its rice to Japanese, Okinawan and Puerto Rican purchasers. Our case is identical to those in which immunity from state taxation has been recognized.

In *Richfield Oil Corp. v. State Board of Equalization, supra,* oil still located within the territorial boundaries of California was held exempt from a state tax because:

(a) A contract for sale to a foreign purchaser had been entered into;

(b) The seller had filed an export declaration;

(c) The terms of the sale were f.o.b. Los Angeles;

(d) The oil was delivered to the port and stored in tanks there;

(e) Bills of lading had consigned the oil to the customer.

Further criteria in determining the certainty of export are the nature of the goods and the existence of bind-

ing orders for the goods. *Carson Petroleum Co. v. Vial,* 279 U.S. 95 (1929). In *Carson,* tax immunity was conferred because the goods involved were of a higher grade than those used in the United States and they were shipped under binding orders existing on the lien date.

In *Von Hamm-Young v. San Francisco,* 29 C.2d 798 (1947), the Court resognized tax immunity for goods stored in San Francisco warehouses awaiting foreign shipment (which was delayed and difficult to arrange because of wartime conditions.) The Court emphasized that the true test for determining the status of export was the certainty that goods had been committed to the process of exportation, ". . . and will not be diverted into the channels of local trade." (29 C.2d 807, citing *Richfield Oil Corp. v. State Board of Equalization, supra.*)

In *Gough Industries v. State Board of Equalization,* 51 C.2d 746 (1959), it was again recognized that no tax may be applied if at the time title passed (which is the taxable event in sales tax cases), "the certainty of the foreign destination was plain" (citing *Spalding Bros. v. Edwards* 262 U.S. 66.)

Respondent County of Yolo, below cited *Richfield Oil* and *Spalding Bros.* for the proposition that there must be a transfer to the foreign purchaser's ship before the tax immunity becomes operative. The lower Court agreed and thus failed to note that those cases involved sales taxes in which the transfer is the taxable event. Of course, as to categories 1, 2 and 3 of RGA's rice, the transfer to the Port of Sacramento must be recognized as the equivalent of transfer to the vessel in terms of RGA's parting

with control over the rice. Compare *McLeod v. Dilworth,* 322 U.S. 327 (1944).

Our present case is identical to the *Richfield* decision in all material respects as to rice in categories 1 through 5. Rice in categories 4 and 5 had not yet been delivered to the port only because of a lack of available space there. Such rice was segregated and stored in RGA's West Sacramento warehouse, approximately one mile from port.

In *Richfield,* this Court rejected the concept of transportation as the sole determinant for export status in favor of a multi-faceted standard in assessing "certainty of export". It was recognized that the older cases had overemphasized the transportation aspect. The Court specifically alluded to *Coe v. Errol,* 116 U.S. 517, so strongly relied upon by respondent below. It was noted that *Coe* concerned only interstate commerce, and that the prohibition against state taxation of exports is far more stringent than the interstate commerce limitations of the *Coe* case. 329 U.S. at pp. 75-77.

In our case, all of the rice was the subject of binding orders from foreign purchasers. RGA's normal business practice is to mill rice for Japan and Okinawa only in response to specific orders from foreign purchasers. As of the lien date each class of rice was the subject of specific binding orders for shipment overseas.

The nature of the goods and RGA's business situation at the lien date made diversion of the rice to domestic use economically unfeasible. Each class of rice in categories 1 through 5 was specially milled for foreign pur-

chasers and no domestic market existed at that time for any of such rice. In the case of the Pearl Paddy Rice (category 6), while yet unmilled, it was selected by RGA for export and was in fact exported only after a determination that said rice could be milled to meet the buyer's specifications. If RGA had not used said rice, it would have breached its contract of February 21, 1966 and it would have been subject to monetary penalties for failing to comply with its export declaration to the United States Government. Because none of the rice is sold domestically, diversion of the goods to domestic use was improbable and, sanctions aside, economically unfeasible.

Each class of rice had been committed to a particular shipment. The rice in each category was sold prior to the lien date and each class was allocated to the respective purchaser. The rice destined for Okinawa, category 2, although not milled specifically for the order it ultimately filled, was on hand because it had been left over from a prior Okinawan shipment as a result of the lack of space on that buyer's ship. RGA had no control over the exact quantity a ship would load. When the sale was made, the rice which met the requisite specifications, remained at the port, awaiting the buyer's ship.

As in *Richfield,* all rice was sold f.o.b. Sacramento.

The rice was, wherever possible, delivered for export. Prior to the lien date, each category of milled rice had been delivered by plaintiff for export. Naturally, in the category 1-3 situation the port received the rice. With category 4 and 5 rice, as in the *Von Hamm-Young* case, *supra,* the limited facilities at the port prevented delivery there. But RGA did all it could to effect delivery: it

transported the rice to its warehouse nearest the Port of Sacramento.

In a recent California case on this subject, *Montrose Chemical Corp. v. Los Angeles, supra,* tax immunity was upheld as to products which had not been delivered to any dock or warehouse at the harbor, had not been delivered to any common carrier for transportation to the harbor, and had not in any manner begun its physical movement to the harbor. The exemption was upheld in *Montrose* because there were:

(a) specific purchaser orders from a particular foreign purchaser;

(b) goods which had been specifically packaged for ocean transportation; and

(c) goods which were not salable in the domestic market.

This case, then, warrants the granting of a tax immunity for all of the categories of rice involved in the present controversy. *Montrose* cannot be distinguished on the ground that the rice here was not specially packaged, because rice shipped in ocean transportation is never packaged in a special way as was the DDT in *Montrose.* Moreover, the rice here was specially milled. The language used by the Court in *Montrose* is particularly relevant to our case. In *Montrose* it was ruled that the constitutional immunity should be applied where the goods,

> ". . . pursuant to *specific purchase orders* from a *particular purchaser,* had been *prepared* and packaged *especially* for ocean transport, and, under the stipulated facts, was *not saleable in the domestic market.* On the tax date the packaged concentrate

was being held pending notification as to the ocean vessel to which it was to be delivered for export (and was thereafter delivered to a vessel and exported).

Applying the tests discussed in the *Hugo Neu* case to the facts in the present case, it was certain that the D.D.T. Concentrate, which could not be sold in the United States and which had been especially packaged for overseas shipment to a particular purchaser, was committed to a foreign destination and could not be diverted to domestic use. As stated in those tests, 'if the certainty of a foreign destination is plain, levying a tax is improper even though there is no delivery to a common carrier.' The packaged concentrate was therefore exempt from taxation under the provisions of Article I, Section 10, Clause 2 of the United States Constitution." 243 C.A.2d at 303-304. (Emphasis added.)

The Court below recognized that its decision herein could not be realistically reconciled with the *Montrose* case. (App. "A", p. viii.)

Indeed, in viewing the six categories of rice involved in our case separately, it will be seen that there exists here numerous additional factors (absent from *Montrose*) which reinforce and support the conclusion that on lien date, all of the rice was certain to be exported and hence immune from the local tax here in issue. For in the present case there was partial delivery to the port, identity of the ships which were to be furnished by the foreign purchaser, binding contracts which could not be met by RGA without using the rice involved in this case, and the additional factor that as much of the rice as possible had been transported to the water's edge. Hence, the rice

remaining at the warehouse was there, of necessity, because of the limited facilities at the port. *Von Hamm-Young v. San Francisco, supra.* Moreover, in our case, RGA had already filed an export-subsidy declaration with the United States Government. Had all the rice here involved not have been used for exportation, RGA would not have been able to meet the binding order and, hence, would have violated its declaration to the government, for sufficient additional suitable rice was not available.

The presence of these various elements in our case makes it a much stronger one for declaration of tax immunity than the situation in *Montrose.* The existence here of these numerous considerations distinguish our case from *Hugo Neu Corp v. Los Angeles,* 241 C.A.2d 703, *Empresa Siderurgica v. Merced,* 337 U.S. 154, and *American Smelting and Ref'g. Co. v. Contra Costa, supra,* emphatically relied upon by the Court below.

This Court must appraise the numerous factors in the present case which lead to the inescapable conclusion that the rice here involved was certain to be exported. RGA does not argue (as the County of Yolo would have the Court believe) that the existence of any one of these elements is conclusive. Rather, it is the cumulative effect of the various considerations which must persuade the Court that on the tax lien date the rice was unconditionally committed to the exportation process.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF COURTS IN OTHER STATES IN DETERMINING EXPORT STATUS FOR PURPOSES OF APPLYING THE FEDERAL CONSTITUTIONAL IMMUNITY FROM LOCAL TAXATION.

The important policies of the federal constitutional immunity of exports from local taxation will be substantially frustrated unless there is uniformity of decision concerning the criteria to be used in determining the status of exports for purposes of Article I, Section 10. The application of the federal immunity from local taxation should not vary because of the geographic location of the goods being taxed.

The great confusion concerning the immunity and the chaos surrounding the appropriate criteria to be utilized in defining the status of exports is clearly reflected in the decision of the California Court of Appeal below. This confusion becomes even more apparent when considered in relation to the numerous decisions of Courts in other states which are hopelessly irreconcilable with the ruling and opinion of the California Court, below. See *Multnomah County v. Dant & Russell,* 158 Ore. 350, 75 P. 2d 986 (1938); *State v. Hammermill Paper Co.,* 149 Minn. 414, 184 N.W. 182 (1921); *Blount v. Munroe,* 60 Ga. 61 (1878).

The decision of the Oregon Court in the *Multnomah County* case is especially pertinent for our present purposes. Unlike the ruling of the California Court below, the Supreme Court of Oregon found that where the local resident had, prior to tax lien date, made a contract with the foreign purchaser, arranged for transportation, and moved the goods to the port that the goods had attained the status of export and local tax assessment was consti-

tutionally prohibited. In the *Multnomah County* case it was also pointed out that the goods in question (railroad ties) were of a particular size, kind and quality specified by the foreign purchasers and not of the type generally used in the United States. All of these circumstances plus many more, which establish the export status of goods existed in our present case. Yet the California Court below refused to recognize the export status of the rice here involved and petitioner's constitutional immunity from local taxation therefor.

Instead, the Court below added to the confusion concerning immunity under Article I, Section 10. Thus, review and a decision by this Court is necessary to bring a semblance of logic and uniformity to the establishment of clearly defined criteria for determining whether and under what circumstances goods will be characterized as exports and hence immune from local taxation under Article I, Section 10 of the Constitution of the United States. Only then will the Courts in the various states be able to confidently, correctly and uniformly apply the proper criteria in determining the nature and extent of the constitutional immunity.

III. THE DECISION OF THE COURT BELOW CONCERNING THE STATUS OF PUERTO RICO IS INCONSISTENT WITH DECISIONS OF THIS COURT AND NUMEROUS OTHER FEDERAL COURTS. UNDER ARTICLE I, SECTION 10, SALES TO PURCHASERS IN PUERTO RICO ARE EXPORTS.

The California Court of Appeal below erroneously characterized Puerto Rico as a state for purposes of the export immunity clause and concluded that the rice shipped to Puerto Rico could not be considered as ex-

port trade. (App. "A", pp. xi, xii.) In so ruling, the California Court ignored decisions by this Court, such as *Fornaris v. Ridge Tool Co.*, ... U.S. ....., 91 S.Ct. 156 (1970), which establishes that Puerto Rico is not to be considered a state for other federal-constitutional purposes. The ruling below also conflicts with decisions of various federal Courts which have expressly refused to treat Puerto Rico as a state or territory of the United States. *Alcoa S.S. Co. v. Perez,* 295 F.Sup. 187, 196 (D. Puerto Rico 1968), case remanded on other grounds 424 F.2d 433; *Corsentino v. International Longshoremen's Ass'n,* 126 F.Supp. 420 (D. Puerto Rico 1954). See also: *Von Hamm-Young v. San Francisco, supra.*

Again a decision by this Court is necessary to resolve this important federal issue.

CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be granted to review the ruling of the Court of Appeal below.

Dated, September 14, 1971.

Respectfully submitted,
LAW OFFICES OF JOSEPH L. ALIOTO,
PETER J. DONNICI,
By PETER J. DONNICI,
Counsel for Petitioner.

(Appendices "A" and "B" Follow)

Appendix "A"

In the Court of Appeal
State of California
First Appellate District

Division Two

1 Civil No. 27321
(Sup. Ct. No. 574862)

Rice Growers' Association of California, a corporation,
Plaintiff and Respondent,
vs.
County of Yolo,
Defendant and Appellant.

Opinion

The county appeals a judgment, whereby plaintiff association was held entitled to recover general taxes, paid under protests, in the aggregate sum of $89,993.96. The sole issue is whether the rice so taxed was or was not an "export" at the time of taxation. If it was, then the taxation was prohibited by article I, section 10, clause 2, of the United States Constitution. If it was not, the county is entitled to retain the sums collected. Although the trial court purported to make findings of fact, the facts were stipulated and hence none were required. This

court is therefore presented with questions of law alone, and makes its own construction of the stipulated facts. (Chase Brass & Copper Co. v. Franchise Tax Bd. (1970) 10 Cal.App.3d 496, 502, hg. den., cert. den. ..... U.S. .....; Crawford v. Imperial Irrigation Dist. (1927) 200 Cal. 318, 335; Export Leaf Tobacco Co. v. County of L.A. (1949) 89 Cal.App.2d 909, 916.)

The joint stipulation of facts may be summarized as follows: Respondent is a non-profit corporation existing under the laws of this state engaged exclusively in the operation of a rice mill and related facilities with its principal office located in West Sacramento, Yolo County. On March 7, 1966, appellant assessed certain quantities of rice belonging to respondent and levied taxes against respondent accordingly, which respondent paid under protest. All of the rice was grown and processed within the state and was stored and shipped in bulk.

The following six categories of rice were taxed:

(1) Pearl Milled Rice, sold to a wholly owned subsidiary corporation of respondent located in Puerto Rico pursuant to a contract "consummated" prior to the tax date. Prior to the tax date, the rice had been milled and processed to the purchaser's exact specifications, transported to the Port of Sacramento and stored in bins belonging to the port authority awaiting ocean transportation in a vessel to be designated by the purchaser. The rice had been milled lighter than Pearl Rice sold by respondent in Hawaii and harder than that sold by respondent in the continental United States. The rice was shipped to Puerto Rico subsequent to the tax date.

(2) Calrose Milled Rice, sold to an Okinawan importer's association pursuant to a contract "consummated" prior to the tax date. Also prior to said date, the rice had been milled and processed to the exact specifications of the purchaser at respondent's mills located at West Sacramento and Biggs, California, transported to the port and stored in bins owned by the port authority awaiting ocean transportation in a vessel to be designated by the purchaser. The rice had not been shipped upon prior delivery to the port because of ship space limitations. Because of its "brokens content," the rice could not be sold in the domestic market without being remilled and graded. The rice was shipped to Okinawa subsequent to the tax date.

(3) Calrose Brown Rice, sold to a Japanese importer's association pursuant to a contract "consummated" prior to the tax date. Also prior to said date, the rice had been milled and processed to the purchaser's exact specifications at respondent's mill at Biggs, transported to the port and stored in bins belonging to the port authority awaiting ocean transportation in a vessel to be designated by the purchaser. The rice was milled only for sale to Japan, and because of its unacceptable edible condition, had no domestic market. The rice was shipped to Japan subsequent to the tax date.

(4) Calrose Brown Rice, sold to the same purchaser and under the same conditions as described in category 3, except that because of insufficient space available at the port, this rice was stored in separate bins in respondent's West Sacramento warehouse (located approximately

one mile from the port) awaiting ocean transportation in a vessel to be designated by the purchaser.

(5) Pearl Brown Rice, sold to the same purchaser and under the same conditions as described in category 4, except that a mere generic difference existed between this type of rice and Calrose Brown Rice.

(6) Pearl Paddy Rice, sold to the same purchaser and under the same contract as that in categories 3, 4 and 5; but on the tax date this rice occupied a storage warehouse at respondent's West Sacramento mill and was milled and processed to the purchaser's specifications *subsequent* to the tax date. Respondent needed said rice to met its contractual obligations. The rice was shipped to Japan with the rice described in category 5 subsequent to the tax date.

Negotiable bills of lading were to be issued by the ocean carrier for all of the categories of rice, and payment was to be made by all purchasers upon delivery of such documents. The terms of all sales were f.o.b. Sacramento. The amount of rice included in each category represented varying proportions of the total rice sold under each of the contracts. The contracts with purchasers in Okinawa and Japan provided for variances of 10 percent of the quantities sold in order to permit ship owners to accommodate the shipments to available ship space.

As a result of milling and processing the rice described in categories 2, 3, 4 and 5, to the purchasers' specifications, that rice could be marketed domestically only if it were remilled, which was economically unfeasi-

ble. Respondent would not mill the rice in such categories without prior order, and, had the rice not been exported, would have breached its sales contracts with the purchasers and its subsidy agreement with the United States Government.

It was indicated upon the argument of this cause, that the milling of rice is designed to remove the outer bran layers surrounding the kernel, successively; the degree to which this is done, depending upon the market. In the milling process, there is breakage of a certain proportion of the rice kernels. For domestic consumption, these commonly are screened out as undesirable. But for Far Eastern markets, where rice has expanded uses, such as for wine making and brewing, broken kernels are acceptable. The various categories are described in the Agricultural Adjustment Act. (7 U.S.C.A. §1380p, subds. (b) and (c)) and the subsidy which respondent refers to is established by the same act. (7 U.S.C.A. §1380k.)

The policy effectuated by the import-export clauses of the federal Constitution, and their history, is well known. (Youngstown Co. v. Bowers (1959) 358 U.S. 534, 545; Cook v. Pennsylvania (1878) 97 U.S. 566; McGoldrick v. Berwind-White Co. (1940) 309 U.S. 33; American Smelting etc. Co. v. County of Contra Costa (1969) 271 Cal. App.2d 437, 455-458, app. dism. 396 U.S. 273.) These therefore need not be elaborated upon this appeal.

There is no question that the tremendous expansion in the definition of commerce with foreign nations, among the several states, and with the Indian tribes, has di-

minished state power as federal controls are established. Therefore, taxation for local purposes upon items and incidents of commerce, once thought completely intrastate, have been imperiled in theory, when not in fact. This has led the United States Supreme Court to a process of careful balancing of federal and state interests in the tax field, where interstate commerce may be "affected" if not "burdened."

The present parlous condition of state and local finances is well known, and appellant properly urges that the definition of "export" should not be expanded from its past well-established connotation, so as to further impair the finances of maritime states and local government. The local taxpayer is not compelled to subsidize exports as a matter of policy. (American Smelting etc. Co. v. County of Contra Costa, supra, 271 Cal.App.2d at p. 459.) Fortunately, we are not called upon to address ourselves to the problem before us as a matter of policy, since the United States Supreme Court adheres to the long-accepted definition of "export."

I

We have concluded that all of the rice in question was properly assessed and taxed: "It will not suffice that a journey to a foreign land is absolutely certain as of the date the tax is levied. Both certainty and motion —or commitment thereto—are necessary to a finding that goods are exports; further, they must exist concurrently." (Hugo Neu Corp. v. County of Los Angeles (1970) 7 Cal.App.3d 21, 24, hg. den.) The recent analysis made by the court in the case last cited, and its con-

sideration of the United States and California cases parallels our own conclusions, and to that extent need not be reexamined.

Most of the contentions of the taxpayer are answered by the leading case of Empresa Siderurgica v. Merced Co. (1949) 337 U.S. 154, 156. It held: (1) it is not enough that on the tax date there is a purpose and plan to export the property; (2) it is not sufficient that in due course, the plan was executed; (3) it is not sufficient that on that date, that goods were prepared for export, but had not been delivered to any carrier for export, nor started on its journey out of the country; (4) so long as the owner maintains physical control of the goods, it does not matter that any diversion of them to another market would occasion a breach of contract; (5) it is immaterial that an export license has been obtained, or that a letter of credit to pay for the goods is available. Like the other factors, these increase the expectation at the tax date that the export would eventuate. "But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed." "Nothing less will suffice." (337 U.S. at p. 157.)

In Cornell v. Coyne (1904) 192 U.S. 418, 427, it is held: "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the ordinary prior burdens of taxation which rests upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation." This was

quoted with approval in Peck & Co. v. Lowe (1918) 247 U.S. 165, 174.

At the outset, it is clear that in view of these cases, and those hereinafter discussed, the decision in Montrose Chemical Corp. v. County of Los Angeles (1966) 243 Cal.App.2d 300 (cert. den. 386 U.S. 1004) cannot be reconciled, except perhaps as valiantly attempted in Hugo Neu Corp. v. County of Los Angeles, supra, 7 Cal. App.3d 21, 24. However enigmatic the denial of certiorari therein, there is no uncertainty in the rules pronounced and applied by the United States Supreme Court and our own. The situation is akin to that authoritatively disposed of in Western L. Co. v. State Bd. of Equalization (1938) 11 Cal.2d 156, 167-168.

An intention to export does not bar general ad valorem taxation; carriage to the export depot does not, since the goods must enter on their final journey to be "exports." While stopped for an indefinite time, or awaiting transportation, or awaiting sale at the point of destination, or at an intermediate point, the goods are subject to general ad valorem taxation. (Diamond Match Co. v. Ontonagon (1903) 188 U.S. 82, 95-96.) Exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other. (Swan & Finch Co. v. United States (1903) 190 U.S. 143, 145.)

The *Empresa* case was subsequent to the California case of Richfield Oil Corp. v. State Board (1946) 329 U.S. 69. It is quite clear, contrary to respondent's contentions, that this case did not abandon the established

requirement of movement out of the country, substituting a test of "certainty of export," in defining *exports*. In the Richfield case, the oil at dockside was not delivered to a *common carrier* for transportation to a foreign country. Previously this had been stated to be the test of what was an export. Here, delivery by Richfield was directly to the consignee, the Government of New Zealand, into its own ship. The court stated (at p. 82): "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. *That delivery marked the commencement of the movement of the oil abroad.* . . . The *means of shipment* are unimportant so long as the certainty of the foreign destination is plain." (Emphasis supplied.)

In Sugarman v. State Board of Equalization (1958) 51 Cal.2d 361, 367, it is stated that the critical point in the Richfield Oil case is that at the time of the sale, the goods were committed to the channels of export (i.e., loaded into the customer's ship) but followed by recognizing, "All goods destined for export are not, however, exempt from state taxation." (Joy Oil Co. v. State Tax Com'n (1949) 337 U.S. 286 (ad valorem property tax); Empresa Siderurgica v. Merced Co., supra, 337 U.S. 154 (personal property tax).)

The process of export begins when goods are committed to the common carrier for transportation out of the country to a foreign destination. (Shell Oil Co. v. State Bd. of Equal. (1966) 64 Cal.2d 713, 720-721, app. dism. 386 U.S. 211.) The court therein (at p. 721) stated that a broad interpretation, leading back to every product, process or service somehow related to and necessary for exportation, has not been accepted.

In a sales tax case, Gough Industries v. State Board of Equal. (1959) 51 Cal.2d 746 (cert. den. 359 U.S. 1011), seven years previously, the court invalidated a sales tax levy, there being a finding by the trial court that the export journey had started when goods left plaintiff's plant, not interrupted by delay for packing; title passing (apparently) upon delivery to the packer. The court did state (at p. 749), "it appears that where an article is manufactured and sold in one of the states for export to a foreign country, it is free from state sales tax under the import-export clause of the United States Constitution if at the time title passed the certainty of the foreign destination was plain."[1] Of course, this statement must be read in context with the other facts of the case. If there is any implication that manufacture and sale for export alone render the item immune before the export process begins, the California Supreme Court recognized this was not so in the *Shell Oil Co.*, case, supra, such

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[1]Standing alone, this statement is contrary to the *Empresa* case and Canton R. Co. v. Rogan (1951) infra, 340 U.S. 511, 515. The court in *Gough Industries* made no reference to the latter case, and distinguished *Empresa* (at p. 750) on the ground carriage there had not commenced. It therefore is clear that this was the basis of the decision, and not the idea that mere commitment to a foreign contract gives the immunity.

broad interpretation not being imposed or accepted by the United States Supreme Court.[2]

In the case before us, title had not passed, and would not pass until the ships were loaded and the carrier's bills of lading were delivered to the respondent, which then became the basis of payment. The situation was comparable to that involved as to oil in Richfield Oil Corp. v. State Board, supra, 329 U.S. 69. The rice became an "export" when it was loaded into the ship carrying it to the foreign country.

Finally, appellant contends that category 1 rice shipped to Puerto Rico did not constitute an export because Puerto Rico is not a "foreign country," but rather a "'state' or 'territory.'"

The same considerations applicable to the other categories apply. In addition, we agree that Puerto Rico is not a foreign country but a commonwealth of the United States.

Pursuant to the congressional statute (48 U.S.C.A. §§731b-731e), the Puerto Rico Instrument of Government or Constitution was adopted by the electorate in 1952, and approved by the Congress. As a commonwealth, Puerto Rico appears to have greater autonomy than a territory, but nominally it is short of statehood. (Secretary of Agri. v. Cent. Roig Co. (1950) 338 U.S. 604, 619.) It is subject to all statutes of the United States,

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[2]The last case cited states the rule (p. 718) "Under the import-export clause, a state may not impose a tax against an article of export *if the article has commenced its movement abroad and the 'certainty of the foreign destination is plain.'*" The requirement is dual. Mere certainty does not suffice. (Hugo Neu Corp. v. County of Los Angeles, supra, 7 Cal.App.3d 21, 24.)

not locally inapplicable. (48 U.S.C.A. §734.) It is territory of the United States, and under U.S. Constitution article IV, section 3, the Congress has power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." (cf. Americana of Puerto Rico, Inc. v. Kaplus (3d Cir. 1966) 368 F.2d 431, cert. den. 386 U.S. 943.) Frequently, throughout the statutes, Puerto Rico is included specifically within the definitions of the United States. One of these is the Agricultural Adjustment Act, relative to rice. (7 U.S.C.A. §1380p. subd. (d).) Examples are given in the *Americana* case, supra. The U.S. Code, General Index, supplement V, page 4777, lists 42 acts wherein "state" means or includes Puerto Rico, but the total index of applicable acts takes four pages. In the Hazardous Substances Act (15 U.S.C.A., §1261) the word "territory" is defined to include Puerto Rico.

In Porto Rico Brokerage Co., Inc. v. United States (C.C.P.A. 1935) 76 F.2d 605, 610 (cert. den. 298 U.S. 671), it was held that products of the United States coming into Puerto Rico were not "imports." Since "import" and "export" are correlative terms, goods leaving the United States for Puerto Rico are not "exports" (id., p. 609) since not destined for a foreign country, which Puerto Rico ceased to be upon ratification of the treaty with Spain. (Id., p. 610.) Though relating to "imports," Dant & Russell v. Board of Supervisors (1943) 21 Cal. 2d 534 is germane to the question, as is the dicta of Dooley v. United States (1901) 183 U.S. 151, 154-155. Since the Philippine Islands now are independent, and Puerto Rico is a commonwealth of the United States,

the considerations advanced by a highly divided court relative to "imports" from the former in Hooven & Allison Co. v. Evatt (1945) 324 U.S. 652, 671, not since repeated, are not deemed applicable to the issue before us.

II

To summarize: The cases establish:

(1) The intention to export is not enough. (Diamond Match Co. v. Ontonagon, supra, 188 U.S. 82, 95-96; Joy Oil Co. v. State Tax Com'n, supra, 337 U.S. 286; Empresa Siderurgica v. Merced Co., supra., 337 U.S. 154; Sugarman v. State Board of Equalization, supra, 51 Cal.2d 361.)

(2) Manufacturing goods or processing to fill an export order, even to consignee's specifications, does not constitute the goods an export, before the final uninterrupted journey commences. (Spalding & Bros. v. Edwards (1923) 262 U.S. 66, 69; Peck & Co. v. Lowe, supra, 247 U.S. 165, 174-175; Canton R. Co. v. Rogan, supra, 340 U.S. 511; Empresa Siderurgica v. Merced Co., supra, 337 U.S. 154; U.S. v. E.C. Knight Co., 156 U.S. 1, 12; Cornell v. Coyne, supra, 192 U.S. 418, 429; Oliver Iron Co. v. Lord (1923) 262 U.S. 172, 178; cf. Utah Power & L. Co. v. Pfost (1932) 286 U.S. 165, 181.)

A comparable case, involving interstate commerce, is Federal Compress Co. v. McLean (1934) 291 U.S. 17, wherein it is stated at page 21: "Most articles, before their shipment in interstate commerce, have had work done upon them which adapts them to the needs of commerce and prepares them for safe and convenient transportation, but that fact has never been thought to immu-

nize from local taxation either the articles themselves or those who have manufactured or otherwise prepared them for interstate transportation." (Citing cases.) Where movement is halted, to process goods for the seller's profit, the property is subject to tax. (Bacon v. Illinois (1913) 227 U.S. 504, 515-517; American Smelting etc. Co. v. County of Contra Costa, supra, 271 Cal.App.2d 437, 453; Diamond Match Co. v. Ontonagon, supra, 188 U.S. 82, 95.)

(3) It is not within the power of the shipper or consignee by contract to convert the character of goods to that of an export, before carriage out of the country commences. (Cf. Federal Compress Co. v. McLean, supra, 291 U.S. 17; Heisler v. Thomas Colliery Co. (1922) 260 U.S. 245, 259.) The existence of such a consummated contract for export of goods is not enough. Empresa Siderurgica v. Merced Co., supra, 337 U.S. 154; cf. Oliver Iron Co. v. Lord, supra, 262 U.S. 172, 178.)

(4) The fact that goods could not be diverted to other purchases or uses without a breach of contract is a factor increasing the certainty of export, but does not make the goods "exports," before the journey out of the country commences. (Empresa Siderurgica v. Merced Co., supra, 337 U.S. 154.)

(5) Certainty of transport to a foreign destination does not create the status of "export" nor exemption from local taxation. (Sugarman v. State Board of Equalization, supra, 51 Cal.2d 361; as to interstate commerce, Heisler v. Thomas Colliery Co., supra, 260 U.S. 245, 259; contra: Montrose Chemical Corp. v. County of Los Angeles, supra, 243 Cal.App.2d 300, 303.)

(6) Passage of title is not a determining factor of itself. In this case, title to the rice had not passed, and was not to pass, nor was respondent to be paid, until the rice was received by the ships and bills of lading issued, upon which payment would be made upon delivery to the purchasers. Cases claimed to establish that certainty of exportation alone when title passes makes an item an export do not support that contention. In Gough Industries v. State Board of Equal., supra, 51 Cal.2d 746, the goods were held to have started their ultimate journey upon delivery to the packer, at which time title passed. (Cf. a comparable case: So. Pac. Terminal Co. v. Int. Comm. Comm. (1911) 219 U.S. 498, 527.) In Richfield Oil Corp. v. State Board, supra, 329 U.S. 69, the sale occurred and title passed, when the oil was pumped into the awaiting vessel.

(7) Carriage of rice by the respondent to the port storage, as the export depot, does not make the commodity an "export." (Diamond Match Co. v. Ontonagon, supra, 188 U.S. 82, 95. Cf. Coe v. Errol (1886) 116 U.S. 517, 525, 528; Bacon v. Illinois, supra, 227 U.S. 504, 514-516; Shell Oil Co. v. State Bd. of Equal., supra, 64 Cal. 2d 713, 722; cf. Federal Compress Co. v. McLean, supra, 291 U.S. 17, 19-20.) It must start on its *ultimate* passage. (Cases above cited; McCluskey v. Marysville & North'n Ry. Co. (1917) 243 U.S. 36, 40.)

(8) Handling of the rice at the port, short of loading it on the boat to carry it to its foreign destination, does not make the rice "exports." (Canton R. Co. v. Rogan, supra, 340 U.S. 511; General Oil Co. v. Crain (1908) 209 U.S. 211, 231) even though the lots were segregated and labeled.

(9) Goods do not become "exports" by the mere fact of leaving the country. Hence, oil delivered to a ship for use as bunker fuel on its voyage is not an export. Because the ship flies a foreign flag does not make it a foreign country, under the export definition. (Shell Oil Co. v. State Bd. of Equal., supra, 64 Cal.2d 713, 719-720, and cases cited.)

The rice had not reached the status of export by reason of storage at the port. The respondents still had title and control until bills of lading were issued by the carriers upon loading the ship and delivered to the purchasers. (Cf. Minnesota v. Blasius (1933) 290 U.S. 1, 11-12.)

(10) Licensing the export under applicable federal acts does not withdraw the respondents' rice from the nondiscriminatory ad valorem tax. (Cf. Federal Compress Co. v. McLean, supra, 291 U.S. 17, 19.)

(11) Freedom of transportation regulated under the commercial powers of Congress is not impaired by ordinary taxes upon the value of the property. (Gloucester Ferry Co. v. Pennsylvania (1884) 114 U.S. 196, 217.)

There are certain parallels in the instant case with the facts found in General Oil Company v. Crain, supra, 209 U.S. 211, 231 (speaking of oil on the dock): "It was only there for distribution, it is said, to fulfill orders already received. But to do this, required that the property be given a locality in the State beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage, of putting it in and taking it from storage. . . .

"This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the State and for which the protection of the State is necessary, a purpose outside of the mere transportation of the oil."

Respondent contends that when commodities can only be used abroad, and can serve no domestic purpose, such goods are irretrievably "committed to export," and hence, even before transportation, are exempt from ad valorem taxation.

No doubt there are many products, some natural, some processed or even manufactured, that would be idle in domestic stocks, for want of local customers. By the stipulations in this case, we are led to believe that when whole rice of varying kinds and grades is available, local consumers impose no demands for broken rice, culled out in the grading and milling process; nor yet perhaps for some grades, or the milling residues. Foreign markets are sought for lower grades of many things; and likewise, for surfeits of commodities which glut the domestic market. For many years, Californians have worn out and smashed up so many automobiles that metal scrap accumulates; and the surplus over domestic demands has, like the rice here, been shipped to Japan. We sense no appreciable difference between this case, and Hugo Neu Corp. v. County of Los Angeles, supra, 7 Cal.App.3d 21, involving such scrap metal. The only difference in that case seems to be, that orders were filled from scrap on the dock, whereas here, the orders were antecedent. The fact that such orders, or contracts "were consummated" before the tax lien date must be held immaterial, since

all of the property in the Empresa case, supra, was subject to the prior contract; and even the fact that a portion of the property had been shipped, pursuant to the contract, was held not to give the remainder the character of "export," on the theory that the cement plant concerned constituted a "unit for use"; and that by shipment of a portion of the machinery, there was an irretrievable commitment, which of a certainty, branded all of the machinery as an export, without physical commencement of the movement from the country.

III

The rules announced by the United States Supreme Court and our own have immense practical validity. As of the first Monday in March, the assessor is required to levy his assessment. This cannot feasibly depend upon the intention of the grower or processor as to the property nor the contract in relation to it. It would thwart all taxation effectively, if assessment required in each instance that the assessor review, analyze and interpret and give legal effect to contracts of the parties. (Cf. Trabue Pittman Corp. v. County of L.A. (1946) 29 Cal. 2d 385, 392, 397.)

The ad valorem taxation here concerned was not a tax on the fungible goods as exports, nor on the privilege of exportation. Thus in Turpin v. Burgess (1886) 117 U.S. 504, 507, it is said: "But a general tax, laid on all property alike, and not levied on goods in course of exportation . . . is not within the constitutional prohibition. How can the officers of the United States, or of the State, know that goods apparently part of the general mass,

and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This cannot for the moment be contended. It would not be true, and would lead to the greatest frauds."

IV

In Canton R. Co. v. Rogan, supra, 340 U.S. 511, 515, Mr. Justice Douglas again stated for the court:

"To export means to carry or send abroad; to import means to bring into the country. *Those acts begin and end at water's edge.* [Emphasis added.] The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined. For if the handling of the goods at the port were part of the export process, so would hauling them to or from distant points or perhaps mining them or manufacturing them. The phase of the process would make no difference so long as the goods were in fact committed to export or had arrived as imports. . . .

". . . Hence we need not decide whether loading for export and unloading for import are immune from tax by reason of the Import-Export Clause. Cf. *Joseph v. Carter & Weekes Co.*, 330 U.S. 442.

"We do conclude, however, that any activity more remote than that does not commence the movement of the commodities abroad nor end their arrival and therefore is not a part of the export or import process."

xx

The judgment is reversed, with directions to enter judgment for appellant county, with costs.

David, J.*

We concur:

Shoemaker, P. J.

Taylor, J.

Filed April 28, 1971,
Clifford C. Porter, Clerk.

*Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

Appendix "B"

Order Due
June 25, 1971

ORDER DENYING HEARING
After Judgment by the Court of Appeal
1st District, Division 2, Civil No. 27321
In the Supreme Court of the State of California
IN BANK

Rice Growers' Association of California

v.

County of Yolo

Respondent's petition for hearing DENIED.

Wright
Chief Justice

I, G. E. Bishel, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 23rd day of June, A.D. 1971.

(Seal)

Clerk
By R. Matteoli,
Deputy Clerk

Filed June 23, 1971,
G. E. Bishel, Clerk.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-386

RICE GROWERS' ASSOCIATION OF CALIFORNIA, a corporation,
Petitioner,

vs.

COUNTY OF YOLO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the Court of Appeal of the State of California, First Appellate District, Division Two

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Respondent, County of Yolo, opposes the Petition for a Writ of Certiorari in the above entitled case and prays that the petition be denied for the reasons set forth herein.